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NO. 59388-9-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

LISA MULLEN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Lisa Mullen was the comptroller at Frontier Ford in Anacortes. She was convicted by a jury of Theft in the First Degree, Conspiracy to Commit Theft in the First Degree and Criminal Profiteering for embezzling more than 1.2 million dollars from Frontier Ford.

On appeal, Mullen claims that the trial court erred in denying a motion for new trial based on a claimed Brady violation because an accountant for the State did not provide documentation of a claimed income evasion scheme of the owner of the car dealership. However, that information could have been obtained by Mullen, was not obviously exculpatory and does not actually establish that the owner was involved in the tax evasion scheme.

Therefore, Mullen's conviction and sentence must be affirmed.

II. ISSUES

1. Where an accountant retained by the State did not provide records from a business which were available to the defense and did not establish significant impeachment, did the trial court err in finding that there was no Brady violation meriting a new trial?

2. Did the trial court abuse its discretion in denying a motion for a new trial based upon the claimed newly discovered evidence?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On December 20, 2002, Lisa Mullen was charged with three counts of Theft in the First Degree and three counts of Money Laundering relating to thefts from Frontier Ford and Ron Rennebohm. CP 1-3.

Discovery and pretrial proceedings were extensive.

On November 10, 2004, the charges were amended to Theft in the First Degree, Conspiracy to Commit Theft in the First Degree, and Use of Proceeds of Criminal Profiteering and Tampering with Physical Evidence with aggravating factors for an Exceptional Sentence. CP 1781-93. These were the charges on which Mullen was tried.[1]

[1] At trial the State withdrew some of the exceptional sentence aggravating factors and some of the predicate acts charged to support the use of criminal proceeds charge. CP 4361-74.

On January 3, 2006, a little over three years after charges were filed, the case came to trial. 1/3/2006 RP 3.[2]

The jury returned verdicts finding Mullen guilty of Theft in the First Degree, Conspiracy to Commit Theft in the First Degree and Criminal Profiteering. CP 4435-7. The jury also entered special verdict finding the presence of twenty three predicate acts of theft and three other crimes to support the Criminal Profiteering charge. CP 4439-41, 4443-65. Mullen stipulated that crimes for which she was convicted were major economic offenses. CP 4466.[3]

Following trial Mullen raised a claim of failure of the State to provide exculpatory information. 5/19/2006 RP 5-10. The parties briefed the matter in the trial court and the defense filed an extensive declaration providing the record from a civil action between the expert used at trial by the State and Frontier Ford. CP 4866-6896.

On November 15, 2006, the trial court heard the motion for a new trial based upon the allegation that the State failed to provide exculpatory information. 11/15/06 RP 2-84.

The trial court denied the motion. CP 7182-4.

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[2] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. There are transcripts of 38 pretrial hearings, 23 days of trial, and 5 post trial hearings.

[3] The trial court dismissed the charge of Tampering with Physical Evidence at trial. 1/31/06 RP 54.

On December 11, 2006, Mullen was sentenced by the trial court to an exceptional sentence of 36 months. CP 7205.

On January 2, 2007, Mullen timely filed a notice of appeal. CP 7215-7229.

2. Summary of Significant Trial Testimony[4]

Ron Rennebohm purchased Frontier Ford in Anacortes in 1990. 1/18/06 RP 130. Rennebohm had worked his way up in the car industry having dropped out of high school and worked his way up to a lot boy. 1/18/06 RP 121-2. Rennebohm was essentially financially illiterate however, and was unable to read a corporate financial statement. 1/18/06 RP 162, 1/19/06 RP 155. Rennebohm's wife testified he could not read a profit and loss statement. 1/17/06 RP 158. So, Rennebohm relied on the skills of others to run Frontier Ford and in the accountant to monitor the financial side of the business. 1/18/06 RP 163-4, 217.

At the time Rennebohm purchased Frontier Ford, Lisa Mullen was in the bookkeeping department of the dealership and Rennebohm made her the comptroller. 1/18/06 RP 132. Kevin Dean was hired as the dealership's general manager in August of 1996.

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[4] Given the volume of the transcripts, this summary is very brief of necessity. Further detailed references to the record are provided in the arguments sections below.

1/18/06 RP 152. Richard Rekdahl is an accountant who was employed by Clothier and Head. 1/18/06 RP 217. Clothier and Head was Frontier Ford's accountant beginning in the early 1990's. 1/18/06 RP 217

Employees at Frontier Ford had accounts receivable which allowed draws on their salaries or loans from the dealership. 1/9/06 RP 91, 1/18/06 RP 172. The account balances were then deducted from subsequent salary. 1/21/06 RP 91.

Rennebohm hired a person to review the financial records at Frontier Ford. 1/19/06 RP 61-2. Rennebohm eventually replaced Kevin Dean with that person. 1/19/06 RP 66-7. A few days later, Rennebohm was given a package of information that he provided to his accountants that there suggested some inappropriate financial dealings. 1/19/06 RP 72. Shortly after, Mullen contacted Rennebohm upset. 1/19/06 CP 73-6. They met at a park in Mount Vernon. 1/19/06 RP 75. Mullen admitted to Rennebohm that she had stolen from him and that if he fired her, she could never pay him back. 1/19/06 RP 76. Mullen also told Rennebohm that in addition to $60,000 that Dean owed them there was an additional $200,000 that Dean owed. 1/19/06 RP 76-7. After attending a meeting with his accountants including Rekdal, Rennebohm then went to the

dealership and then reported the theft to Anacortes Police in June of 2002. 1/5/06 RP 71, 1/19/06 RP 78-9.

Shortly after investigating, Mullen called to Rekdal and told him that she had lost her integrity. 1/24/06 RP 56. Mullen then told Rekdal that if she didn't have a job, she couldn't pay it back. 1/24/06 RP 56. Rekdal traced activity in receivable accounts of Dean, Rennebohm and Mullen at Frontier Ford. 1/25/06 RP 40.

Rekdal described the different accounts and transactions in the accounts totaling the loss under the accounts as follows:

Dean "285" account	1/25/06 RP 60-87	$239,111
Mullen "010" account	1/25/06 RP 87-127	$167,620
Dean "998" account	1/25/06 RP 127-132	$276,552
Rennebohm "049" account	1/25/06 RP 153-154	$ 12,762
Rennebohm "1810" account	1/25/06 RP 154-162	$210,472
Balance Sheet	1/25/06 RP 163-172	$158,585
Income Statements	1/25/06 RP 173-179	$ 71,965
Checks not posted	1/25/06 RP 179-181	$ 73,465
Outstanding obligation	1/25/06 RP 181-183	$ 60,958

Much of the embezzlement involved Mullen using draws from accounts receivable of current and former employees, including her own, to purchase personal property. Most of the transactions were done by Ms. Mullen personally but some were done by the bookkeeping staff whom she supervised. 1/27/06 RP 77. Hundreds of thousands of dollars of purchases were traced directly to Ms. Mullen by receipts, checks, and even pictures.

1/8/06 RP 180 (testimony regarding Ms. Mullen writing checks to herself and debiting amount to Mr. Dean's account receivable); 1/9/06 RP 15-23 (detailing Ms. Mullen's purchase of more than $33,000 in jewelry in 20 month period); 1/11/06 RP 169-75 (detailing Ms. Mullen's purchases of Doncaster clothing totaling nearly $32,000 in a seven month period); 1/11/06 RP 181-84 (detailing Ms. Mullen's purchases of stuffed toy rabbits from Bunnies by the Bay totaling $19,622); 1/13/06 RP 140-50 (detailing Ms. Mullen's purchases at St John Boutique totaling nearly $75,000 over four months), 1/17/06 RP 34 (detailing a single purchase of jewelry by Ms. Mullen totaling $17,500).

By accounting machinations, Ms. Mullen removed the debts reflected in accounts receivable by transferring funds from other accounts within Frontier Ford and then aging or writing off the receivables.

Frontier Ford's annual sales were about $80 million dollars, so the transactions went unnoticed for years. Rekdal testified the total discrepancies he located in the accounts at Frontier Ford totaled $1,271,130. 1/25/06 RP 181-2.

At trial Mullen testified claiming the transactions were done with Rennebohm's approval. 1/31/06 RP 120; 2/1/06 RP 42. Mullen

claimed that the intent was to "hide the profits" of Frontier Ford from Mr. Rennebohm's business partner, Ragnar Pettersson. 1/31/06 RP 160.

IV. ARGUMENT

1. The State did not fail to disclose material exculpatory evidence.

Mullen claims that accountant Richard Rekdahl failed to disclose information to the prosecutor to provide to the defense about what defense claims was a tax evasion scheme by Rennebohm involving National Warranty Company/Payment Insured Plan (NWC/PIPI)[5]. Appellant's Opening Brief at page 14, CP 6900. (describing what NWC/PIPI stands for). Contrary to defense claims, that accountant was not aware of the claimed exculpatory value in advance of trial, the defense was actually aware of the claimed exculpatory value and the defense with reasonable diligence could have obtained the information.

i. Facts regarding claim.

Three months following trial Mullen raised a claim of failure of the State to provide exculpatory information. 5/19/2006 RP 5-10.

[5] The reference to CP 1220 is to describe what the abbreviation NWC/PIPI means.

The parties briefed the matter in the trial court and to support the claim the defense filed an extensive declaration providing the record from a civil action between the expert used at trial by the State and Frontier Ford. CP 4866-6696.

The argument by Mullen, was that there was a billing scheme regarding warranty contracts sold at Frontier Ford and that Rennebohm received funds as a result of that scheme which were not reported as income. Appellant's Opening Brief at page 11.

At trial, Lisa Mullen actually testified about the payment insured plan (PIPI) that she claimed was used to create income from extended service policies on the vehicles that was unreported. 2/1/06 RP 27-8. She explained that the dealer inflated the cost of the plan and that the dealer was then either paid back in cash, or that the dealer is given a loan which is then paid back with the proceeds of the inflated price. 2/1/06 RP 27. Mullen claimed to have worked on the PIPI loans with Rennebohm and that Frontier Ford received no benefits. 2/1/06 RP 27. After attributing the conduct to Rennebohm, Mullen stated that the purpose of the process was tax evasion. 2/1/06 RP 28. On cross examination by the State, Mullen testified that Rennebohm told her to divert PIPI income to his home. 2/1/06 RP 69-70. Mullen volunteered that the "PIPI thing is huge." 2/1/06

RP 70 (see also 2/2/06 RP 7 where Mullen attempts to explain the PIPI as a kickback). Then on examination by defense counsel for Dean, Mullen further explained the whole PIPI scheme. 2/2/06 RP 114-118. Mullen explained that it is inflating the price of the service contract and then the business that takes the service contract sends back a check called a pack which goes to the car dealer himself. 2/2/06 RP 117. Mullen claims to sum up the scheme as follows;

> Q. Why does it come back to him personally rather than Frontier Ford, since Frontier Ford sent the money in?
> A. Because that's how it is designed, designed to give the dealer cash, in large pleasure it is so we will continue selling that company's product rather than switch to any hundreds of other service contracts that we could sell.
> Q. What's wrong with that?
> A. He's getting income siphoned off the store. He is getting cash in his pockets. He is buying a house or motor home.
> Q Basically you are telling me Frontier Ford is sending in the original money, the money coming back is going personally into Mr. Rennebohm's pockets?
> A. That's what I'm telling you.

2/2/06 RP 118. At trial, the defense did not call any accountants. Such an expert could have explained the importance of the claimed NWC/PIPI scheme.

Following trial, the defense based the motion for Brady violation as well as the motion for a new trial on documents gathered

after trial. The motion was based substantially on a Declaration of John Murphy (Lisa Mullen's trial counsel) dated September 12, 2006, in which he lists and attached 126 exhibits to support the motion. CP 4866-6696.[6] Of those exhibits, exhibit 120 was the most significant basis for the motion.[7] That document is a transcript of a deposition taken by the attorney for Frontier Ford of Richard Rekdal regarding his dealings with Frontier Ford. CP 4867. This deposition was taken for the case between Frontier Ford and Clothier & Head on January 31, 2006. CP 4870-1. In the transcript, Rekdal explains when he first noted the issue of the NWC/PIPI reporting some time after June of 2002. CP 4866-6696 (Exhibit 120 at pages 154-6). In that deposition, Rekdal indicates he did not know why the loans involving PIPI were not on the books of Frontier Ford. CP 4866-6696 (Exhibit 120 at pages 155). Rekdal also goes on to explain that contrary to claims of defense on appeal, his belief as to the fact that money left

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[6] Mullen's Appellant's Brief indicates that they would be filing an updated brief with page references to a large clerk's paper which was located and reference. Mullen has not filed that brief. The State responds somewhat in the dark herein, making some significant assumptions about which exact page of the clerk's paper is being referred to by Mullen. Should defense provide a reply brief which cites to particular clerk's paper which were not those identified by the State, the State may seek leave of the court to provide a supplemental response. Mullen also appears on occassion to cite to the incorrect clerk's papers number in the Appellant's Brief.

[7] Because of the fact that this clerk's paper is more than 1,800 pages long, the State will reference to the exhibit number in the clerk's paper and where applicable, the transcript page number and line where applicable. Because of the voluminous nature of this document, Mr. Dean cited to that in the same manner.

Frontier Ford without the authorization of Rennebohm was not necessarily changed as a result of the information he gathered after trial. CP 4866-6696 (Exhibit 120 at pages 246-7).

Also crucial to the defense case at the trial court is a declaration of Richard Rekdal regarding what he knew and when he knew it. Rekdal's declaration in response to the motion for a new trial was filed on October 20, 2006. CP 6899-12. On appeal, Mullen jumps to significant assumptions that information was "suppressed." Appellant's Opening Brief at page 14, 17. The State contends that the declaration explains Rekdal's responses in the deposition showing that he was not aware of the extent of the claim of under-reporting income on tax returns until after the trial. CP 6903 at paragraph 2, lines 3-4; CP 6904 at paragraph 1, lines 3-4.

In that declaration, Rekdal describes that he had obtained two schedules from NWC/PIPI from Rennebohm prior to trial. CP 6903. Those two schedules had about eight pages of summary activity between Frontier Ford and two other businesses of which only one was owned by Rennebohm. CP 6903. The schedules were obtained from NWC/PIPI. CP 6903. Based upon the schedules, Rekdal determined that some funds were not properly reported as income. CP 6903-4. However, Rekdal could not determine whether this was

error or oversight by Frontier Ford, or whether the lack of reporting was intentional. CP 6904. In late March of 2006, after the trial, Rekdal reviewed NWC/PIPI information obtained from that business by his attorney. CP 6904, 6910. Based upon that additional information reviewed after trial and with the information from the testimony from Lisa Mullen at trial, Rekdal indicated that he formed the opinion well after trial that there was the intent not to disclose income. CP 6904. Rekdal did not indicate in the deposition that he could actually determine whether Rennebohm was the person who actually formed the intent not to disclose the income. CP 4866-6696 (Exhibit 120 at page 247). In fact when asked he replied as follows:

> Q. Who did you hear say what in the criminal trial that's led you to this hesitancy?
> A. I don't have any hesitancy. Nobody – alls I'm saying, this money left Frontier Ford, okay, and it was my belief per Mr. Rennebohm that it was unauthorized.
> Q. Are you changing that belief today?
> A. Not necessarily.
> Q. What do you mean by not necessarily?
> A. Based on the information I have, that was my belief at the time and is probably my belief today. Best I can answer that question.

CP 4866-6696 (Exhibit 120 at page 247).

Rekdal goes on to explain in detail in the declaration how as a result of the embezzlement, Rennebohm would have incurred a tax

liability of more than $262,000. CP 6905. Furthermore, Rekdal explained that the tax liability he actually paid as a result of the embezzlement would have been far greater than the tax liability he would have been avoiding. CP 6906 at paragraph 2. Finally, Rekdal indicates that his testimony would not change from that provided to the jury at the criminal trial. CP 6911 at paragraph 4.[8]

The prosecutor provided a declaration that explained his awareness of issues relating to NWC/PIPI before trial. CP 6890-98. The prosecutor described that he had not received any documents relating to NWC/PIPI. CP 6891. Furthermore, defense had even questioned Ron Rennebohm about the NWC/PIPI during a deposition occurring in 2003. CP 6897.

On November 15, 2006, the trial court heard the motion for a new trial based upon the allegation that the State failed to provide exculpatory information. 11/15/06 RP 2-84.

The trial court denied the motion and provided a written ruling regarding the court's determination regarding the claimed Brady violation. CP 7182-4. The court found as follows:

> The defense cites to Brady v. Maryland, 373 U.S. 83 (1963), alleging that the State knew of

[8] Contrary to Mullen's assertions, Rekdal also indicated that he remained under subpoena and was still available to testify at trial following his testimony. CP 6911.

exculpatory evidence and violated the Due Process rights of the defendants by failing to provide such information. First, having presided over this matter for three years, this Court has seen no evidence of knowing failure to disclose. Second, the Court has faith in Mr. Sequine's integrity and observed his demeanor in trial and argument. Nothing was hidden from the defense. As I have noted in previous rulings, the State far exceeded its responsibility in providing discovery. This was an extraordinarily complicated case which was handled as well by both sides as it could have been.

Alternatively, the defense theorizes that if the failure to disclose was unknowing, Mr. Rekdal's allegedly hidden knowledge should be imputed to the State on the theory that Redkal was a state agent. No authority cited supports that proposition. Even if there were, the Court would be hard pressed to find that the evidence might have changed the outcome of the trial. There is no evidence of a Brady violation or anything closely approximating CrR 8.3 mismanagement by the prosecution. The information relied on in post-trial motions was available to both sides in advance of trial and, in the case of PIPI/NCW, probably better understood by the defense than the State. The motions to dismiss on these theories are DENIED.

CP 7183-4.[9]

ii. Legal standards regarding Brady claim.

Due process requires the State to disclose "evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" United States

[9] The other areas that Mullen claims where areas where evidence was suppressed were regarding "medical reimbursement," "previous investigation by Mr. Rekdal revealed no theft," "cash flow problems," and "scope of service." Appellant's Opening Brief at pages 18-20. None of these bases were even argued in the hearing raised before the trial court and thus were not part of the trial court's rulings. 11/15/06 RP 10-49.

> v. Bagley, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (*quoting* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). **There is no Brady violation, however, "if the defendant, using reasonable diligence, could have obtained the information" at issue.** In re Personal Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).
>
> **Moreover, evidence is "material" and therefore must be disclosed under *Brady* "only if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"** United States v. Bagley, 473 U.S. at 682; Benn, 134 Wn.2d at 916. In applying this "reasonable probability" standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); Benn, 134 Wn.2d at 916. **"A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of trial.'"** Id. (*quoting* Bagley, 473 U.S. at 678).

In re Personal Restraint of Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999)

Benn v. Lambert provides a three part test a defendant must prove to show a Brady violation.

> In Brady, the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. 1194.

> Supreme Court cases following Brady clearly established that the defendant must prove three elements in order to show a Brady violation. **First**, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material. *See* United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). **Second**, the evidence must have been suppressed by the State, either willfully or inadvertently. *See* United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). **Third**, prejudice must result from the failure to disclose the evidence. *See* Bagley, 473 U.S. at 678, 105 S.Ct. 3375.
>
> Evidence is deemed prejudicial, or material, only if it undermines confidence in the outcome of the trial. *See* Bagley, 473 U.S. at 676, 105 S.Ct. 3375; Agurs, 427 U.S. at 111-12, 96 S.Ct. 2392. For purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record." Agurs, 427 U.S. at 112, 96 S.Ct. 2392. Moreover, we analyze all of the suppressed evidence together, using the same type of analysis that we employ to determine prejudice in ineffective assistance of counsel cases. *See* Bagley, 473 U.S. at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.); *see also* United States v. Shaffer, 789 F.2d 682, 688-89 (9th Cir.1986) (analyzing collectively the prejudice resulting from the state's suppression of four different pieces of impeachment material).

Benn v. Lambert, 283 F.3d 1040, 1052-3, *rev. denied*, 537 U.S. 942, 123 S.Ct. 341, 154 L.Ed.2d 249 (9th Cir. 2002) (emphasis added)

iii. Argument Pertaining to Brady claim.

I. The information was not within the exclusive control of the State and with reasonable diligence could have been obtained by defense.

No Brady violation occurs if the defendant could have obtained the information himself through reasonable diligence.

State v. Thomas, 150 Wn.2d 821, 851, 83 P.3d 970 (2004), *citing* In re Personal Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

The defense has not established that they would have been unable to obtain what is claimed to be "material exculpatory information" from other sources.

In In re Personal Restraint of Benn, the defendant made a claim of a Brady violation for the State's failure to disclose a fire marshal's report. In re Personal Restraint of Benn, 134 Wn.2d at 915-6. The State had provided a detective's report that summarized that the fire marshal's office had determined that a fire was most likely accidental. In re Personal Restraint of Benn, 134 Wn.2d at 916. The information could have been used to attempt to impeach a witness who claimed that the defendant had two men burn his trailer for insurance money. In re Personal Restraint of Benn, 134 Wn.2d at 918. The Court denied the Brady claim in part because the fire marshal's conclusion had been provided and more significantly because the defendant could have obtained the actual report. In re Personal Restraint of Benn, 134 Wn.2d at 918.

Similarly in the present case, the defense was aware of the issue of the NWC/PIPI schedules. During a deposition, defense had

asked Mr. Rennebohm about those schedules. CP 6897. Defense counsel for both Ms. Mullen and Mr. Dean in fact presented testimony at trial from Ms. Mullen about those schedules. The unrebutted claim by Ms. Mullen's testimony was that Rennebohm was involved in a tax evasion scheme involving NWC/PIPI and that it was done at the direction of Mr. Rennebohm. 2/1/06 RP 27-8, 69-70, 2/2/06 RP 114-8. Despite the fact that the defense was aware of this claim and their allegation that it was "huge" defense made no attempt to actually gather the schedules from NWC/PIPI prior to trial. In fact, defense did not retain an accountant who could have established the alleged importance of the claim prior to trial.

The civil attorney representing Rekdal's accounting firm was readily able to gather all the relevant NWC/PIPI schedules by subpoena. CP 6909-10.

The same situation applies to the other claimed items of information that Mullen uses to base her Brady claim. Evidence pertaining to medical reimbursement of Mullen was available to defense before trial and there was in fact testimony was taken on that issue. 1/25/06 RP 114-6. There is no indication that Mullen's personnel file which they claim had some additional information was "suppressed" or unavailable to defense. There was testimony that

the embezzlement was not significant prior to 2001. 1/25/06 RP 58-183, Exhibit 109 at trial at last page. There is no showing by defense that the financial records of Frontier Ford were unavailable so that they could not make their own analysis of the case flow situation at the dealership. Finally, regarding the scope of services, the information relied on by the defense indicates the records of the billing of service by Clothier and Head were provided to the defense prior to trial. CP 4866-6696 (Exhibit 18).

In the absence of the defense establishing why they could not have obtained any of the information prior to trial, this Court need not further evaluate the Brady claim. For the purposes of completeness, the State addresses the remaining tests under Brady.

II. The information was not favorable to the accused.

Evidence is favorable to the accused if it is exculpatory or impeaching. Strickler v. Greene, 527 U.S. 263, 281-2, 119 S.Ct. 1936, 144 L.Ed.2d 286(1999).

The State and defense have markedly different interpretations of the importance of the NWC/PIPI schedules.

Defense claims that this information indicated that Rennebohm was engaged in a tax evasion scheme and that it would

corroborate Ms. Mullen's testimony. This is based upon the claim that they believe Rekdal stated in the deposition "I don't know what to believe anymore." Appellant's Opening Brief at page 26. Thus, the defense claims the information impeaches Rennebohm.

From the State's perspective this claim is at best a slight change in opinion of Rekdal at one point when recently confronted with new information and not meaningful impeachment.

The State contends that the NWC/PIPI schedules reviewed by Rekdal did not have any exculpatory value. It was Ms. Mullen's testimony at trial upon which Rekdal was basing his skepticism about whether the claimed tax evasion was "intentional." CP 6904. And further when reviewing Rekdal's deposition carefully, you find that he did not vary his opinion from that presented at trial. CP 4866-6696 (Exhibit 120 at pages 246-7). Finally, Mr. Rekdal presented a deposition in which he indicated that his testimony would not have deviated from that presented at trial. CP 6911. After he had time to consider the information as a whole, his opinion did not change.

Against these significant backdrops of different interpretations, this Court should remember that this claim applies to what was a collateral matter. Defense is trying to establish some impeachment of Rennebohm by claiming that he was involved in a tax evasion

scheme in one part of the business and therefore he was authorizing Mullen to take excessive pay in another part of the business.

Even if you assume the defense claim that Rennebohm was authorizing the NWC/PIPI that does nothing to establish that Rennebohm was also willing to have Ms. Mullen obtain almost $1.2 million dollars out of the business over the course of 4 years in addition to other salary earned. As Rekdal explained in his deposition that this scheme makes no sense because Rennebohm would have caused a tax liability as a result of the embezzlement which far exceeded the tax benefit from the claimed tax evasion scheme with NWC/PIPI. CP 6905-6.

Mullen also makes claims in other areas. She claims that Rekdal was aware that Rennebohm had authorized medical insurance for Ms. Mullen. Appellant's Opening Brief at page 18-9. This does not contradict the trial testimony of Rekdal on the issue. 1/25/06 RP 114-6 (testifying that the amount of medical insurance was higher than Frontier Ford handbook amounts, not run through payroll and other discrepancies in bookkeeping entries).

Mullen claims that Rekdal also provided information that a prior investigation in 2001 did not reveal any evidence of theft. Appellant's Brief at page 19. This is actually consistent with the

testimony and information presented to the trial and testified to by Rekdal before the jury that most of the embezzlement started in 2001 and that any significant discrepancies before that time occurred in the account of Kevin Dean. 1/25/06 RP 58-183, Exhibit 109 at trial at last page.

Mullen also claims that Rennebohm implied that the cash flow problems at Frontier Ford were as a result of the theft and that Rekdal may have presented a different opinion after trial in his deposition. Appellant's Opening Brief at page 19-20. Despite Mullen's contention, the deposition of Rekdahl does indicate that the employee theft contributed to the financial situation at the dealership. CP 4866-6696 (Exhibit 86 at page 2, lines 7- 17). The portion of the deposition that Mullen cites to does not indicate that Rekdal withheld his opinion about other cash flow issues from the defense. CP 4866-6696 (Exhibit 120 at pages 214-6). Thus, it does not show that Rekdal was "suppressing" this opinion about cash flow problems at Frontier Ford.

Finally, Mullen also complains that the scope of service provided by Rekdal was greater than that testified to at trial. Appellant's Brief at page 20. In fact at trial, Rekdal testified that before 2002, Clothier and Head did primarily the federal corporate tax

return of Frontier Ford. 1/24/06 RP 39. In addition, Rennebohm's personal return and occasional special projects were also done by Clothier and Head. 1/24/06 RP 39. The information gathered from billing records after trial do not indicate that this incorrect. CP 4866-6696 (Exhibit 119 at Exhibit 5 to Declaration of Linda Saunders). In reviewing the summary information, Rennebohm was charged $36,000 over seven years for the personal tax returns and $115,000 over the same seven years for company tax returns. CP 4866-6696 (Exhibit 119 at last page of Exhibit 5 to Declaration of Linda Saunders). Over that same seven year period almost $200,000 of work was done for non-tax projects. CP 4866-6696 (Exhibit 119 at page of Exhibit 5 to Declaration of Linda Saunders). However, of that $200,000 half of that was performed during the investigation of Mullen and Dean's activities between June of 2002 and August of 2005. CP 4866-6696 (Exhibit 119 at page 26, 27-44, of Exhibit 5 to Declaration of Linda Saunders). Given the multi-million dollar car business that Frontier Ford was engaging in, Rekdal's testimony at trial was not a misrepresentation as to the level of accounting involvement of Clothier and Head with the business and Mr. Rennebohm.

None of this information is significantly favorable to Mullen.

III. The information was not suppressed.

Of the three types of situations where a Brady claim might arise, the present claim falls within the third category where the claim is that the government "failed to volunteer exculpatory evidence never requested, or requested only in a general way." Kyles v. Whitley, 514 U.S. at 534. To have a "suppression" in this context, the government must be aware of the exculpatory nature of the evidence in order to be able to realize that it needs to be disclosed.

> While expressing the opinion that representatives of the State may not "suppress substantial material evidence," former Chief Justice Traynor of the California Supreme Court has pointed out that "they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." In re Imbler, 60 Cal.2d 554, 569, 35 Cal.Rptr. 293, 301, 387 P.2d 6, 14 (1963). And this Court recently noted that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706.

U.S. v. Agurs, 427 U.S. 97, 109, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Mullen summarily concludes that the information was suppressed information. As to the NWC/PIPI, what Rekdal indicated was that the only documents obtained from NWC/PIPI were eight pages of schedules which were used to prepare Rennebohm's tax

return. CP 6903. Rekdal did not provide the information but could not determine whether the non-reporting of the income was intentional or by oversight. CP 6904. It was an opinion after reviewing trial transcripts, where he determined that the non-reporting was intentional. CP 6904. He did not have the information to form the opinion before trial and only came to evaluate the NWC/PIPI after having reviewed further information from subpoenas obtained by Rekdal's own counsel well after the trial here. CP 6904, 6911.

Information was not suppressed because Rekdal was unaware that the evidence had any potentially exculpatory value until after the testimony of Ms. Mullen. Furthermore, Rekdal's opinion as to whether the NWC/PIPI billing practice was intentional was not formed until after trial when he became aware of transcripts in which Ms. Mullen indicated that the practice was intentional. CP 6904. Given that Rekdal was not aware of the potential value of the evidence and the fact that he did not form an opinion until after trial, there was no "suppression" of material evidence because even to the extent that Mullen alleges that it was exculpatory impeachment, Rekdal was not aware of that.

Similarly the other types of evidence that Mullen claims were either provided or otherwise available and thus not "suppressed."

The information pertaining to medical reimbursement was available to defense prior to trial and testimony was taken on that issue. 1/25/06 RP 114-6. There is no reference to the record indicating that Mullen's personnel file which they claim had some additional information was "suppressed" or unavailable to defense. There was actual testimony about the limited nature of the embezzlement prior to 2001 as explained above. There was also information for defense as to the financial records of Frontier Ford so that they could make their own analysis of the case flow situation at the dealership.

Finally, with respect to the scope of services, the information relied on by the defense actually indicates that the records of the billing of service by Clothier and Head were actually provided to the prosecutor to provide to the defense prior to trial. CP 4866-6696 (Exhibit 18).

There is insufficient showing of "suppressed" information.

IV. Mullen has not shown prejudice.

> The prosecutor has a constitutional duty to disclose exculpatory matter to the defense. This duty is breached where the omitted evidence, evaluated in the context of the entire record, creates a reasonable doubt as to defendant's guilt that did not otherwise exist. State v. Campbell, 103 Wn.2d 1, 17, 691 P.2d 929 (1984), *cert. denied,* 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985); United States v. Agurs, 427 U.S.

97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); State v. Vaster, 99 Wn.2d 44, 49, 659 P.2d 528 (1983).

State v. Bebb, 108 Wn.2d 515, 522-3, 740 P.2d 829 (1987). For purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record." United States v. Agurs, 427 U.S. at 112, 96 S.Ct. 2392.

In reviewing the evidence which was claimed to have been withheld, the evidence was not significant in the entire context of the record at trial. Mullen claims that the evidence corroborated the defense case. Appellant's Opening Brief at pages 17-8. In fact, the claimed information does not show that Rennebohm knew he was under-reporting income. Since Rennebohm relied on others to handle his accounting, it is highly likely that the under-reporting of income by the NWC/PIPI scheme Rennebohm was not intentional. If it was not intentional it does not establish that Rennebohm was defrauding others as Mullen claims.[10]

Mullen also claims that the evidence impeached Rennebohm. Appellant's Opening Brief at pages 20-2. She claims that the evidence would show that Rennebohm was aware and involved in

[10] Rekdal's deposition indicates that when Rennebohm became aware of the under-reporting of income by the NWC/PIPI accounting, Rennebohm did include that within his income and amended his tax return to do so. CP 4866-6696 (Exhibit 120 at pages 289, 93-4.

the complex scheme. However, there is no information shown in the defendant's brief that establishes that it would have shown Rennebohm's knowledge. It is also just as possible that this could have been done by Mullen. Mullen also cites to the fact that defense had admitted a transcript in which Rennebohm had admitted to signing a false note to protect the dealership from his wife in their property settlement. Appellant's Opening Brief at page 21, 1/18/06 RP 110-6. Admission of Rekdal's knowledge about whether Rennebohm thought the note was false would not have added anything significant because Rennebohm had already admitted to testifying that it was phony.

Mullen also claims that Rennebohm implied that the cash flow problems at Frontier Ford were as a result of the theft and that Rekdal may have presented a different opinion after trial. Appellant's Opening Brief at page 19-20. Despite Mullen's contention, the declaration of Rekdahl does indicate that the employee theft contributed to the financial situation at the dealership. CP 4866-6696 (Exhibit 86 at page 2, lines 7- 17). It does not show that Rekdal was "suppressing" this opinion about cash flow problems at Frontier Ford.

It should be noted that all of these claimed bases are collateral to the fact of the theft from Frontier Ford proven at trial. Additionally,

the trial court was in a similar position and determined that there was no prejudice.

> There is no evidence of a Brady violation or anything closely approximating CrR 8.3 mismanagement by the prosecution. The information relied on in post-trial motions was available to both sides in advance of trial and, in the case of PIPI/NCW, probably better understood by the defense than the State. The motions to dismiss on these theories are DENIED.

CP 1280.

V. The accountant was not part of the typical prosecution team.

Finally, the State believes that the fact that the entire basis for the alleged Brady violation is made regarding an accountant retained by the State is significant. The Brady requirement has typically extended to law enforcement.

In Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the court indicated that the standard extends beyond just the prosecutor handling the case. "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. at 437. Kyles explained the purpose was because "the police investigators sometimes fail to inform a prosecutor of all they know" and that

placing the burden on the prosecutor insures communication of relevant information. Kyles v. Whitley, 514 U.S. at 438. Kyles involved a case of nondisclosure by police. Numerous cases apply this standard to impute the knowledge of law enforcement to the prosecution or consider them part of the prosecution team. Strickler v. Greene, 527 U.S. 263, 116 S.Ct. 1936, 144 L.ed.2d 286 (1999), United States v. Zuno-Acre, 44. F.3d 1420 (9th Cir. 1995) *cert. denied*, 516 U.S. 945 (1995). Mullen cites to no cases in which the Brady claim has extended to knowledge held by someone who was not prosecution or law enforcement.

The State contends extending this principal to a person who is not traditionally part of the prosecution team such as a private accountant is not an appropriate extension of the Brady doctrine. Extension to the accountant would not encourage the communication that Kyles encourages by making law enforcement part of the prosecution team.

2. The trial court did not err in denying a motion for new trial based upon "newly discovered evidence."

Dean also contends that the court erred in denying a motion for new trial. Appellant's Opening Brief at page 28-32. The factual basis for this motion is essentially the same basis as presented in the

Brady claim explained above. Similarly, the trial court denied the claim. The trial court specifically found that "the evidence proffered would not probably change the outcome of the trial; that it could have been discovered with reasonable diligence before trial, and that the evidence, in any event, is essentially impeaching only." CP 7183.

> We review a trial court's denial of a motion for new trial for manifest abuse of discretion. State v. Hutcheson, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991), *review denied,* 118 Wn.2d 1020, 827 P.2d 1012 (1992). Under CrR 7.5(a)(3), a court in its discretion may grant a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected ... [by][n]ewly discovered evidence material for the defendant, which [he] could not have discovered with reasonable diligence and produced at the trial." If the newly discovered evidence is merely cumulative or impeaching or will not change the trial result, it does not justify granting a new trial. Hutcheson, 62 Wn. App. at 297, 813 P.2d 1283.
>
> A defendant must establish "that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). The absence of any one of the five factors is grounds for the denial of a new proceeding. Williams, 96 Wn.2d at 223, 634 P.2d 868.

State v. Thach, 126 Wn. App. 297, 318, 106 P.3d 782 (2005).

Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The same arguments made by the State in response to the Brady claim above apply in response to the motion for new trial under CrR 7.5. The State believes it has previously addressed all the areas to the extent they were identified by the defense.

One fact highlighted by the defense in the argument regarding the motion for new trial is that Rekdal never reduced his mental impression to a form of evidence until after trial. Appellant's Opening Brief at page 31. Mullen complains about not being able to discover the impressions prior to trial. However, any impressions that Rekdal had regarding the intentional nature of the NWC/PIPI funds were created after he reviewed the testimony of Ms. Mullen at trial. Thus, any opinions as to that were not present prior to trial. Rekdal strongly indicates that his testimony would not have changed from that presented at trial. CP 6911. Rekdal supports this by explaining in his declaration that Rennebohm would not have agreed to the thefts engaged in by Dean and Mullen because the tax liability incurred and actually paid would have far outweighed any tax liability he was

avoiding. CP 6906. Rekdal summarizes his evaluation of the financial impact on Rennebohm, Dean and Mullen.

> The bottom line here is that the only person harmed was Mr. Rennebohm. Mr. Dean and Ms. Mullen have received substantial sums of money tax free. It is important to note that they paid no taxes on any of the excess draw activity, and in fact, likely have significant outstanding tax liabilities to this day because of it.

CP 6906.

In summary, the argument of Mullen pertaining to the NWC/PIPI does not make logical sense for someone that they claim is so driven to try to avoid debts at every step in his business dealings.

V. CONCLUSION

For the foregoing reasons, the convictions of Lisa Mullen for Theft in the First Degree, Conspiracy to Commit Theft in the First Degree, Criminal Profiteering and the sentence imposed should be affirmed.

DATED this 26th day of September, 2008.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Craig D. Magnusson and Jennifer Castro, addressed as Magnusson Law Office, 800 Bellevue Way, N.E., Suite 400, Bellevue, WA 98004-4273. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 26th day of September, 2008.

Karen R. Wallace

KAREN R. WALLACE, DECLARANT